A **WATERMECH ENGINEERING SDN BHD & ANOR**

v.

NOVAVIRO TECHNOLOGY SDN BHD

B COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
ABANG ISKANDAR JCA
[CIVIL APPEALS NO: W-02(IPCV)(W)-977-04-2013
C & W-02(IM)(IPCV)-1251-05-2013]
15 SEPTEMBER 2014

INTELLECTUAL PROPERTY: *Copyright - Designs - Developer of system had proprietary rights over design - Whether licensee had exclusive*
D *rights over technology - Whether entitled to protection under law*

CONTRACT: *Joint venture - Joint venture agreement - Breach of - Relationship of parties - Whether fiduciary relationship existed*

EQUITY: *Fiduciary relationships - Duties - Defendants used confidential*
E *information obtained from plaintiff during course of joint venture agreement without plaintiff's authorisation - Whether there was a breach of fiduciary obligation*

CIVIL PROCEDURE: *Anton Piller order - Copyright, infringement of*
F *- Whether there was risk that incriminating evidence might be destroyed - Whether order correctly granted*

The plaintiff ('respondent') had filed the suit against the defendants ('appellants') for infringement of a CSTR anaerobic digester
G system ('CSTR system') developed by Keck Seng (Malaysia) Sdn Bhd ('Keck Seng') and breach of confidential information or breach of fiduciary duty by the defendants. According to the plaintiff, the defendants had used the technology developed by Keck Seng and other confidential information obtained in the
H course of a joint venture between the defendants' joint venture vehicle, Aquarius System Sdn Bhd ('Aquarius') and the plaintiff in developing the defendants' own CSTR system. This act by the defendant, the plaintiff claimed, had breached Keck Seng's proprietary and legal rights over the system, which was licensed
I exclusively to the plaintiff for commercialisation and the defendant was prevented from doing so without authorisation from the plaintiff. The defendant on the other hand, argued that although

Keck Seng was one of the earlier developers of the CSTR system, they do not own any proprietary and/or legal rights over the design as the design was never patented nor was it capable of being patented. The defendants further argued that payments made by Aquarius to the plaintiff was for the use of Keck Seng's name in marketing their CSTR system and not for any proprietary rights over the system as procured and provided to them by the plaintiff or for the purported usage of Keck Seng's technology. The defendants thus denied that they owed any fiduciary duty to the plaintiff or had breached any fiduciary obligations which may have arisen from the joint-venture agreement between them and the plaintiff. The defendant, in return, counterclaimed against the plaintiff for infringing the first defendant's copyright in the design of its drawing and for unlawfully interfering with the first defendant's business.

Held (dismissing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Although the idea of extracting methane gas from Palm Oil Mill Effluent ('POME') through an anaerobic digestion process was not first germinated by Keck Seng, the system that was developed was unique in that it was efficient, reliable, safe, and cost competitive. There was proprietary right in the design that was entitled to protection under the law and the plaintiff, as the lawful licensee of the design, was also entitled to enforce it against the defendant. (para 31)

(2) The defendant was estopped from denying that the CSTR system had in fact came from Keck Seng when a clause in the joint venture agreement between Aquarius and the plaintiff had expressly stipulated that the plaintiff would retain a certain amount of payment received from United Plantation Berhad to be used as payment to Keck Seng as licensing fees for the use of the CSTR system. On the balance of probabilities, the defendant had infringed the CSTR system that was first designed by Keck Seng. The technology used by the defendant was principally based on Keck Seng's CSTR system and other confidential information acquired from the plaintiff through Aquarius during the course of the joint venture agreement when the defendant had purportedly developed its own CSTR system. (paras 37 & 38)

(3) A fiduciary relationship existed between the defendant and the plaintiff as a result of the joint venture agreement between the plaintiff and Aquarius. The fiduciary relationship arose from their partnership, which imposed certain obligations on the defendant pertaining to the confidential nature of sensitive information over which the plaintiff was licensed to have for a fee that it had paid to Keck Seng. The duty was on the defendant to protect the confidential information that was available with regard to Keck Seng's technology that was being employed by Aquarius to construct the system for the numerous third parties during the duration of the joint-venture with the plaintiff. (paras 41 & 42)

(4) The defendant had breached its fiduciary duty owed to the plaintiff which was especially obvious from the evidence contained in the engineering drawings purportedly related to the defendant's UBS system. (para 46)

(5) Because of the risk factor that the defendant may destroy or cause to be destroyed the incriminating evidence, the decision to grant the *Anton Piller* order in favour of the plaintiff was maintained. Various documents that had helped the court in coming to a decision had been obtained from the enforcement of the said order; most importantly, the recovered drawings which from the cross-examination had shed some light on the real source of the UBS system which the defendant claimed to be entirely different from the CSTR system. (para 48)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif (responden) telah memfailkan tindakan terhadap defendan-defendan (perayu-perayu) untuk pelanggaran sistem penghadam anaerobik CSTR ('sistem CSTR') yang telah direkacipta oleh Keck Seng (Malaysia) Sdn Bhd ('Keck Seng') dan pencabulan maklumat sulit atau kemungkiran tanggungjawab fidusiari oleh defendan-defendan. Menurut plaintif, defendan-defendan telah menggunakan teknologi yang direkacipta oleh Keck Seng dan maklumat-maklumat sulit lain yang telah diperoleh daripada projek usahasama antara syarikat usahasama defendan, Aquarius System Sdn Bhd ('Aquarius') dan plaintif dalam penciptaan system CSTR defendan sendiri. Plaintif mendakwa bahawa perbuatan defendan ini telah melanggar hak Keck Seng ke atas sistem tersebut dari segi hak

milik dan undang-undang, yang telah diperlesenkan untuk tujuan dagangan kepada plaintif dan oleh itu, defendan tidak berhak untuk memperdagangkan sistem tersebut tanpa kebenaran daripada plaintif. Manakala defendan-defendan menghujahkan bahawa walaupun Keck Seng merupakan antara perekacipta pertama bagi sistem CSTR tersebut, mereka tidak mempunyai sebarang hak milik atau hak undang-undang ke atas sistem tersebut kerana rekaan tersebut tidak pernah atau tidak layak dipatenkan. Defendan-defendan menghujahkan lagi bahawa bayaran yang telah dibuat daripada Aquarius kepada plaintif adalah untuk kegunaan Keck Seng dalam pemasaran sistem CSTR tersebut dan bukan untuk hak undang-undang ke atas sistem tersebut seperti yang telah dijanakan dan diberikan kepada mereka daripada plaintif atau disebabkan oleh penggunaan teknologi kepunyaan Keck Seng. Justeru, defendan-defendan menafikan bahawa mereka menanggung sebarang tanggungjawab fidusiari terhadap plaintif mahupun telah memungkiri apa-apa tanggungjawab yang mungkin timbul daripada usahasama antara defendan dan plaintif. Defendan-defendan juga telah menuntut balas terhadap plaintif atas pelanggaran hakcipta lukisan rekaan sistem tersebut dan atas gangguan tidak sah terhadap urusniaga defendan pertama.

Diputuskan (menolak rayuan dengan kos)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Walaupun Keck Seng bukanlah badan yang pertama untuk menunaskan idea untuk mengekstrak gas metana daripada sisa kilang minyak kelapa sawit ('POME') melalui proses pencernaan anaerob, sistem yang telah direkacipta oleh Keck Seng adalah unik kerana ia cekap, kukuh, selamat dan mempunyai kos berdaya saing. Hak milik telah wujud ke atas rekaan tersebut yang berupaya untuk dilindungi oleh undang-undang dan plaintif selaku pemegang lesen yang sah berhak untuk mengambil tindakan untuk menguatkuasakannya terhadap defendan.

(2) Defendan diestop daripada menafikan bahawa sistem CSTR tersebut berasal daripada Keck Seng apabila terdapat peruntukan dalam perjanjian usahasama antara Aquarius dan plaintif yang mengatakan secara jelas bahawa plaintif akan memegang sebahagian daripada bayaran daripada United

Plantation Berhad untuk dibayar kepada Keck Seng sebagai yuran perlesenan bagi penggunaan sistem CSTR tersebut. Atas imbangan kebarangkalian, defendan telah melanggar sistem CSTR tersebut yang telah pertama direkacipta oleh Keck Seng. Teknologi yang telah digunakan oleh defendan adalah berdasarkan sistem CSTR Keck Seng dan maklumat-maklumat sulit lain yang telah diperoleh daripada plaintif menerusi Aquarius sepanjang perjanjian usahasama tersebut berjalan apabila defendan kononnya telah merekacipta sistem CSTR sendiri.

(3) Hubungan fidusiari telah wujud antara defendan dan plaintif melalui perjanjian usahasama antara plaintif dan Aquarius. Hubungan fidusiari tersebut muncul daripada perkongsian kedua-dua mereka, yang telah mengenakan obligasi-obligasi tertentu ke atas defendan berkaitan dengan sifat sulit bagi maklumat sensitif yang telah diperlesenkan kepada plaintif dengan bayaran yuran kepada Keck Seng. Tanggungjawab defendan adalah untuk melindungi maklumat sulit yang ada berkenaan teknologi kepunyaan Keck Seng yang sedang digunakan oleh Aquarius untuk pemasangan sistem tersebut bagi beberapa pihak ketiga sepanjang perjalanan usahasama tersebut dengan plaintif.

(4) Defendan telah melanggar tanggungjawab fidusiari yang ditanggung terhadap plaintif dan hal ini paling ketara daripada keterangan yang terkandung dalam lukisan kejuruteraan yang kononnya berkaitan dengan sistem UBS defendan.

(5) Disebabkan oleh faktor risiko bahawa defendan berkemungkinan memusnahkan atau menyebabkan pemusnahan keterangan-keterangan yang boleh menunjukkan kesalahan defendan, keputusan untuk memberikan perintah *Anton Piller* bagi pihak plaintif dikekalkan. Pelbagai dokumen yang membantu mahkamah dalam membuat keputusan telah diperoleh daripada penguatkuasaan perintah tersebut; terutamanya lukisan-lukisan yang telah didapati semula dan daripada sesi soal-balas yang menyusul telah menjelaskan sumber sebenar sistem UBS yang didakwa oleh defendan adalah berlainan sama sekali daripada sistem CSTR.

Other source(s) referred to:
John Glover, *Commercial Equity Fiduciary Relationship*, [Butterworths] 1995, p 8

For the appellants - Gideon Tan (N Sivaraj & Shally Tan with him); M/s Gideon Tan Razali Zaini
For the respondent - Razlan Hadri (Gregory Ling with him); M/s Ranjit Singh & Yeoh

Reported by Lyana Shohaimay

JUDGMENT

Abang Iskandar JCA:

[1] In the High Court, the plaintiff (respondent), had sued the defendants (appellants) for the infringement of a CSTR Anaerobic Digester System ("CSTR system") developed by Keck Seng (Malaysia Berhad) ("Keck Seng") and breach of confidential information or breach of fiduciary duty by the defendants. We shall refer to parties as they were referred to in the court below. As for the facts of the case, we would reproduce what the learned trial judge had summarised as the facts which were not the subject of any strong objections from either side during the hearing of this appeal before us.

[2] The brief facts are thus as follows: The plaintiff's claim is that the technology used in the construction of the CSTR system by the first defendant is principally based on Keck Seng CSTR system or other confidential information acquired from the plaintiff through Aquarius System Sdn Bhd ("Aquarius") during the course of the joint-venture between the plaintiff and the first defendant.

[3] The plaintiff claimed that Keck Seng had developed a unique and original system namely the CSTR system and Keck Seng had licensed exclusively to the plaintiff all of its proprietary and legal rights in the purported Keck Seng proprietary technology ("Keck Seng's technology"). The plaintiff claimed that it owns copyright and/or has exclusive right over the Keck Seng's technology and the defendants are to be restrained from using the same without the authorisation of the plaintiff.

[4] The defendants did not dispute that it is recognised in the palm oil industry that Keck Seng in the 1980's, was one of the earlier companies to recover methane gas from Palm Oil Mill Effluent ("POME"). However, it is the defendants' position that the CSTR system utilised by Keck Seng to extract methane gas from POME is neither patented nor capable of being patented nor has it any proprietary right. It merely uses commonly available technology in constructing tanks and/or holding tanks, piping and/or pumps.

[5] The defendants denied that Keck Seng's technology, ie, its technical know-how, methodology, expertise and specialised knowledge of the CSTR system had any proprietary rights.

[6] The defendants alleged that Aquarius had made payments to the plaintiff for the use of Keck Seng's name for marketing purposes only and not for any proprietary system procured and provided by the plaintiff or for the usage of the purported Keck Seng's technology.

[7] Further, it was contended by the defendants that each and every contract undertaken by Aquarius were designed and/or prepared by the first defendant with the technical input of the second defendant to which such designs were tailored to the respective requirements of the individual contracts.

[8] Thus, the defendants denied that the facts had given rise to any fiduciary obligations on the part of the defendants and that they were in breach of any fiduciary obligations. Thus, the defendants counterclaimed against the plaintiff for infringing the first defendant's copyright in the design of its drawing relating to the Nubika Project and United Plantation Berhad ("UPB") and unlawfully interfering with the first defendant's business.

The Plaintiff's Case

[9] Dr Tong Soo Long, ("PW2") is a substantial shareholder and managing director of the plaintiff. PW2 was the one who had approached the late Mr Gian Heng Fatt, who was then the deputy general manager of Keck Seng in 2002, with the idea that the plaintiff could acquire the licence to commercialise the CSTR system from Keck Seng.

[10] The plaintiff contended that through a licence agreement dated 2 June 2003 (see pp. 26 to 37 of defendant's core bundle of documents), between Keck Seng and the plaintiff, the plaintiff acquired the "exclusive rights to the commercial exploitation" of the CSTR system. In this regard, the licence agreement provides *inter alia*:

(i) That Keck Seng had developed the CSTR system and therefore was the legal and beneficial owner of the CSTR system.

(ii) In consideration for allowing the plaintiff to commercially exploit the CSTR system amongst the local palm oil mill companies, the plaintiff had to pay Keck Seng licensing fees as prescribed in cls. 4 to 6 of the licence agreement.

(iii) Pursuant to the license agreement, Keck Seng agreed to provide to the plaintiff, in essence, the workings of the CSTR system including all available drawings related to it.

[11] However, engineer NS Chua, the engineer who developed the CSTR system for Keck Seng ("PW1") stated in his evidence-in-chief that at that time, Keck Seng only had in their possession drawings limited to the construction of the "floating roof" design of the anaerobic digester tanks and later the "fixed roof" design of the anaerobic digester tanks. Detailed engineering drawings of the other parts of the CSTR system were not drawn as the CSTR system had been meant for internal use and was never intended to be marketed or sold as a product.

[12] It is the plaintiff's case that accordingly, full engineering drawings had to be prepared and drawn up as to all parts of the CSTR system using the existing completed structures at the Keck Seng Palm Oil Mill in Masai, Johor. In other words, the CSTR system located at the Keck Seng Masai Palm Oil Mill was to form the basis of future copies of the CSTR system for other palm oil companies.

[13] Hence, upon obtaining the licence, the plaintiff started to market the CSTR system to palm oil companies. Eventually in 2005, UPB expressed a serious interest in the CSTR system for their Jendarata, Teluk Intan, Perak estate.

[14] As negotiations advanced between UPB and the plaintiff, in late 2005, the plaintiff began to source for an engineering and construction works contractor to prepare the engineering drawings and build the CSTR system for the plaintiff for the UPB project. This led the plaintiff to the defendants.

The Defendants' Case

[15] The second defendant, Goh Eng Huat ("DW3") first met PW2 sometime around 2005 when PW2 approached him while attending a Council Meeting of the Association of Environment Consultants and Contractors of Malaysia. PW2 informed the second defendant that he had submitted a proposal to construct a continuous flow-stirred anaerobic tank to UPB.

[16] PW2 also conveyed to DW3 of his concern that it is unlikely that UPB would want to award the project to him since he has no prior working relationship with them. DW3 offered himself to check with UPB as to the status of the project since he had a very good working relationship with them.

[17] DW3 then notified PW2 that UPB has yet to decide to whom the project shall be awarded and PW2 upon knowing this invited the second defendant to collaborate with him to secure the said project.

[18] DW3 together with the plaintiff had agreed to utilise a dormant company, Aquarius to undertake projects to design, build and construct a continuous flow stirred tank reactor CSTR system for the recovery of methane gas from the treatment of POME.

[19] An agreement dated 11 May 2006 ("Aquarius agreement") was executed between the plaintiff and Aquarius as an assignment of the contract works for the design, supply, fabrication, installation, testing, and commissioning of the CSTR system for UPB from the plaintiff to Aquarius.

[20] The defendants did not dispute that it is recognised in the palm oil industry that Keck Seng, in the 1980's, was one the earlier companies to recover methane gas from POME. However, it is the defendants' position that the CSTR system utilised by Keck Seng to extract methane gas from POME is nether patented nor capable of being patented nor has it any proprietary right. It merely uses commonly available technology in constructing tanks and/or holding tanks, piping and/or pumps.

[21] The defendants denied that Keck Seng's technology, technical know-how, methodology, expertise and specialised knowledge of the CSTR system has any proprietary rights. A

[22] According to the defendants, Aquarius made payments to the plaintiff for the use of Keck Seng's name for marketing purposes and not for any proprietary system procured and provided by the plaintiff or for the usage of the purported Keck Seng's technology. B

[23] Each and every contract undertaken by Aquarius was designed and/or prepared by the first defendant with the technical input of the second defendant to which such designs were tailored to the respective requirements of the individual contracts. C

[24] The defendants also contended that plaintiff never provided any proprietary drawings, technical specifications, engineering drawings and/or construction drawings that are sufficient for construction purposes and/or capable of being copied and/or utilised by Aquarius in the procurement of any contracts. D

[25] The learned trial judge, having heard the evidence of witnesses called by both parties, had decided in favour of the plaintiff. In the course of deciding this case before her, the learned trial judge had identified that one of the crucial issues that needed to be determined by her was whether the CSTR system, the centre of the dispute between the parties, was a system that was developed by the plaintiff, so as to give it proprietary rights over the system. E F

[26] Perhaps it would now be pertinent to understand what this CSTR system was all about. To begin with, it had pertained to the oil palm industry. In particular, it had been concerned with a system whereby the methane gas that was emitted by the processing of fresh oil palm was captured from the treatment of POME whereby the captured methane would later on be used as fuel. Prior to the coming into existence of the CSTR system, the methane gas that was emitted from the oil palm processing would be released *in situ* and was burned openly. There was no retention of the gas to be used at a later date. The captured methane gas could be used to fuel the refinery boilers. G H I

[27] According to the plaintiff, this CSTR system was developed by Keck Seng dating back to 1983. It was a home-grown technology that was meant only for use by Keck Seng which had owned oil palm plantations and that there was no intention during that time to market the system on a commercial basis.

[28] The plaintiff also reiterated that only in 2002 that Keck Seng was interested in commercialising the system when PW2 approached Keck Seng with a view to market the system.

[29] The essential and unique feature of the CSTR system that was developed by Keck Seng was described by PW1, the engineer with Keck Seng who had developed the system. The system would be used to produce POME waste from the extraction of crude oil palm from fresh fruit bunches. The CSTR system was developed to maximise and capture the methane gas that was the by-product of the safe discharge of the POME. In his own words, PW1 had said as follows:

> The uniqueness of the CSTR Anaerobic Digester System does not come from the anaerobic process itself. Instead, the uniqueness of the system comes from how the system was built and designed to maximize the production of methane gas and the regulation of the produced methane gas to allow for an efficient, cost effective and safe system that is reliable.

To further emphasise the unique feature of the system, PW1 had said:

> As I have said before, no one else had developed and built a similar system that could produce this amount of methane gas per tone of POME waste treated and at the same time work as efficiently as Keck Seng's CSTR Anaerobic Digester System.

[30] From the evidence, it was apparent that the two main features that typified this CSTR system that was developed by Keck Seng have been, (1) the dual mixing system for the anaerobic digester tanks, and (2) the floating roof design. Both designs were created to maximise efficiency and flexibility of the CSTR system. The dual mixing system that was designed had employed the use of an external system of tangential injection pumps for circular mixing and effluent re-circulation along with a gas-lifting process for the vertical mixing to create optimum mixing of the POME causing a more efficient production of methane gas.

As regards the floating roof, it had been designed based on the use of an annular (ring shaped) liquid sealing design and incorporating unique tension guide rollers along the tank to smoothly guide the rise and fall of the floating roof changing the gas-holding capacity of the anaerobic digester tanks to regulate the methane gas produced. The benefit to be derived from this has been to enable the methane gas supply at regulated pressure.

[31] After considering the evidence before her, the learned trial judge had concluded that the protection that the plaintiff had sought from the law had been the "method or process developed by Keck Seng to maximise the extraction and capture of the methane gas in the CSTR system". (See p. 15 of her grounds of decision). With respect, we would agree with her conclusion. Indeed the idea of extracting methane gas from POME through an anaerobic digestion process was never an idea first germinated by Keck Seng. But what Keck Seng had developed *via* PW1 has been the efficient, reliable, safe and cost competitiveness of the CSTR system with its unique features. In that design there is proprietary right for which Keck Seng is entitled to protection under the law. The plaintiff as the lawful licensee is also entitled to enforce it against the defendants.

[32] The defendants had contended that the CSTR system that was graphically shown in P-3 was not the product of Keck Seng. It was the defendants' contention that the 'pump tangentially feeding into the digester tank, flexible holes and draft tube' were already available in the public domain as general engineering knowledge. For good measure, the defendants had also argued that DW1 had developed the CSTR system with there own skill and knowledge and was therefore the copyright owner.

[33] To this, we noted that the learned trial judge had made a finding, that the defendants had never brought before her, evidence that there were designs, prior to 1984 that were similar to the one that was developed by Keck Seng, namely the CSTR system. On available evidence as contained in the records of appeal, we find that the learned trial judge had not erred in coming to such a finding. Indeed, during the course of submissions before us, learned counsel for the defendants had contended again that based on the literature on engineering, the dual system employed in the CSTR system was already available in the public domain.

But, having considered such contention, we are of the respectful view that the learned trial judge was entirely correct when she concluded at p. 16 in her grounds of decision, as follows:

> ... and in my view it did not show that a similar system was ever specifically designed and/or constructed by anyone else or that such unique features of the CSTR system were already in use together in the public domain.

Indeed the contention of the defendants was against the grain in so far as the evidence was concerned.

[34] We note that the CSTR system, as the name connotes, is a 'system' and as such it must necessarily consist of at least a few components that are so essential, which when taken together contribute immensely towards its functionality as a system. In the CSTR system, the 'dual mixing system' and the 'floating roof' are uniquely and essentially designed into delivering the methane gas safely and efficiently. The learned trial judge was correct in her finding that there was no similar system in use prior to 1984 that had employed both these features in the palm oil processing industry relating to methane gas production and storage.

[35] The learned trial judge had also found as a fact that the CSTR system was not first developed by DW1. Instead, she had alluded to the evidence of PW1 who had developed the system at Keck Seng. According to PW1's evidence, an engineer could build the CSTR system if he was provided with the photographs. He was referred to in court, the 75 photographs marked as exhs. P-4(a) to P-4(w3) which showed detailed parts of the CSTR system and agreed that such photographs would be sufficient for an experienced engineer to build a system similar to the Keck Seng digester system. Indeed in the cross-examination of PW1 by learned counsel for the defendant, PW1 had said:

> These photographs were taken very extensively. I don't know who has taken this photograph but it actually zero in on each and individual detailed components. So you can see that so many photographs were taken on this system. Anybody who got this photograph will be able to design, reproduce (the CSTR system).

[36] In fact, it was established in evidence before the learned trial judge that SD3 was given the 75 photographs by PW2. DW3 in fact admitted to this fact during his cross-examination. On top of that, another witness of the defendant, DW1 had admitted to being briefed in detail on the CSTR system during a visit to the Masai Oil Palm facility that employed the Keck Seng system. The learned trial judge was correct when she concluded that in the circumstances there was ample opportunity for the defendant to come up with the process in generating the methane gas that was based on the CSTR system that was licensed to plaintiff from Keck Seng.

[37] As was earlier alluded to by us, the plaintiff and the joint-venture entity called Aquarius had entered into not a few agreements and in the agreement relating to the UPB project, in cl. 3(iii) of that agreement, it was stipulated that the plaintiff would retain a certain amount of payment received from UPB for payment to Keck Seng as licensing fees for the use of the Keck Seng CSTR system. Aquarius was a dormant company picked by the defendant to become the joint-venture vehicle with the plaintiff. In the circumstances, the learned trial judge was correct in concluding that the defendant would be estopped from denying that the CSTR system had in fact come from Keck Seng.

[38] Based on the foregoing, this court has found that the learned trial judge did not err when she concluded that on the balance of probabilities that the defendants had infringed the CSTR system that was first designed by Keck Seng. She was also correct when she found that the defendants had used the technology principally based on Keck Seng's CSTR system and other confidential information acquired from the plaintiff through Aquarius during the course of the joint-venture between the plaintiff and the first defendant, when it purportedly developed its own CSTR system. The learned trial judge's finding can be seen at para. 52 at p. 24 of her grounds of decision. We have found no reason to disturb her findings on the evidence as adduced before her.

[39] Then there was the issue of fiduciary duty and confidential information and breaches in relation thereto by the defendants. The basis for these had been the joint-venture agreement that was entered into by both parties, whereby Aquarius was used as a

vehicle to undertake the construction of the system for third parties in relation to the generation and storage of methane gas at the latters' oil palm plantations. From a perusal of the relevant documents (relating to these contracts) it had become clear that the system that was to be employed would be the Keck Seng technology system which the plaintiff had been licensed to operate. In fact, every contract with the third parties contained specific stipulation to that effect. To illustrate as an example, we would advert to the contract with UPB. That contract related to the proposal to design, supply, fabricate, install, test, and commission a 400 M3/d POME Biogas-capture anaerobic digester system. Clause 3.0 of the contract stipulated as follows:

> PROPOSED TREATMENT PROCESS.
>
> The treatment process is basically a Continuous Flow-Stirred Tank Reactor (CSTR) System based on the proprietary KS Anaerobic Digester technology and design. The digester tanks comprise both fixed roof and floating roof types. The floating roof tanks also serve as gas holder and for balancing the flow for the biogas before being consumed directly in the boilers.

[40] It was not in dispute that 'KS' therein referred to 'Keck Seng'. In fact, all the contracts with the third parties employed this anaerobic digester technology which was licensed to the plaintiff. The defendants' entry into the joint venture with the plaintiff *via* Aquarius did not see them bringing along with them any anaerobic digester technology. As can be seen clearly in the joint-venture agreement between the plaintiff and Aquarius, the latter's entry into the joint-venture was basically to commercially exploit the viability of the digester system whereby it was specifically recognised that the plaintiff was 'the holder of the Licensing Rights of Keck Seng (Malaysia) Berhad's (hereinafter called "KS") unique and original full capacity Anaerobic Tank Digester System (hereinafter to be referred to as "the Digester System" ...' (See the agreement between the plaintiff and Aquarius at Tab 14 of the respondent's core bundle). The defendants did not have any history of dealing in any supply or invention of anaerobic digester system, prior to its involvement in the industry with the plaintiff through Aquarius. That was an admitted fact by the defendant's witness, DW1 through cross-examination by learned counsel for the plaintiff. In fact under the above agreement

cl. 4 therein contained provisions that specifically made it an obligation on the part of Aquarius in that, among others, it "shall not in any way infringe harm or contest the rights and interest of NVT (the plaintiff) to the Digester System". A

[41] During the subsistence of the joint-venture between the plaintiff and Aquarius, there was the creation of the fiduciary relationship between the plaintiff and the defendants who were the alter ego of Aquarius. DW3, the defendants' third witness had in fact signed the agreement on behalf of the defendants. That fiduciary relationship thereby had imposed the duty not to abuse that special relationship by not abusing the confidential information that was available to the defendants in relation to the Keck Seng technology also known as the CSTR system. The evidence had shown that the technology to be used by Aquarius in all the joint-venture projects for third parties was the CSTR system. The evidence was also clear that the defendants knew that for a fact, part of the amount received from the joint-venture projects was to be paid to the plaintiff, being payment towards licensing fees to Keck Seng for using the CSTR system that was developed by PW1 for Keck Seng. This court, with respect is of the view that the learned trial judge was correct when she held that there existed a fiduciary relationship between the defendants and the plaintiff as a result of the joint-venture between the plaintiff and Aquarius. As a partner in the joint-venture projects with the plaintiff, the defendants were in a fiduciary relationship with the plaintiff and with that relationship of a fiduciary nature, certain obligations were imposed on the defendants that pertained to the confidential nature of sensitive information over which the plaintiff was licensed to have for a fee that it had paid to Keck Seng. The learned trial judge's reliance on the authoritative work by John Glover in his book entitled, *Commercial Equity Fiduciary Relationship*, [Butterworths] 1995 had been justified and we see no error on her part in that regard. Indeed at p. 8 of his book, the learned author had written, among others, as follows: B C D E F G

> Confidential information may be received pursuant to a fiduciary relationship. Trusted employees may learn their employer's trade secrets through the circumstances of their employment; a manufacturer may discover the confidential idea of an inventor, who approached the manufacturer to do a deal. Equity in these cases has established jurisdiction to relieve the employer and the H I

A inventor if their confidences are breached. Relief is often grounded in the fiduciary nature of the relation whereby the confidence was passed. Injunctive or restitutionary remedies are allowed against a person who misuses the confidential information of another, or discloses to a third party.

B For example, during negotiations for a co-operative business venture between a small mining company and a larger one, details of a mineral discovery were revealed. A duty for the larger company to respect the smaller company's confidence arose and was broken when the larger company decided to exploit the C discovery alone. Or a former employee of an importing company might start up his own business and use the same network of suppliers that the former employer found by experience to be reliable. Yet again, a dishonest employee of a geosurvey company might sell confidential data of a client oil company to a third party. Confidentiality is breached in each case.

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[42] With that fiduciary relationship as found by the learned trial judge, there arose a fiduciary duty on the part of the defendants to protect the confidential information that was available pertaining to the Keck Seng technology that was being employed by E Aquarius to construct the system for the numerous third parties during the duration of the joint-venture with the plaintiff.

[43] The complaint by the plaintiff against the defendants had been that when Aquarius left the plaintiff, it had secured a F contract with a company called QL-Palm Tong Lon Palm Oil Mill in Tawau, Sabah ("the QL Plant") for the construction of the system at the latter's oil palm plantation, whereby the plaintiff had suspected that the defendants had offered a system that was essentially the same as the CSTR system that was developed for G Keck Seng by PW1. The defendants had denied this allegation and had contended that the system it was offering to the QL plant was the 'USB system' that the defendants claimed to be its proprietary owners. According to the defendants, the USB digester was a system that operated entirely differently from the one used H in the CSTR system. That technology, according to the defendants was sourced from a handbook entitled the "*Wastewater Treatment Plants-Planning, Design and Operation*" by one Syed R Qasim, whereby it had involved a process described as an "upflow anaerobic sludge blanket process". From this process, it was I claimed by SD1, that the defendants had obtained the name "the

USB system". However, during cross-examination by learned counsel, DW1 agreed that the USB system's mixing system was essentially the same as the dual mixing system that was uniquely peculiar to the CSTR system owned by Keck Seng. In this regard, the learned trial judge had at para. 77 at p. 34 of her grounds, concluded as follows:

> As explained by PW1, the uniqueness of the CSTR system [apart from the dual mixing system and the floating roof] is how all these features were arranged together to work efficiently, cost effective and safely. This seems to me forms the confidential information.

[44] The evidence abound in terms of the opportunity that the defendants had to access to the CSTR system when it entered into a joint venture with the plaintiff to supply the CSTR system to the various third parties. The defendants were given detailed insight into the designs of the system where a total of not less than 75 photographs were given to the defendants from which an experienced engineer could reproduce the system similar to the CSTR system. The defendants were given briefings on the CSTR system as well as given a site visit to the CSTR plant owned by the plaintiff. It was revealed out in evidence too that the defendants had never been in the business of supplying biogas power plants before they partook in the joint-venture projects with the plaintiff through the special purpose vehicle ("SPV") called Aquarius to supply the CSTR system to the various third parties. Indeed, in those agreements to so supply, there were confidentiality provisions, thereby negating any semblance of ignorance that the defendants may put up in relation to the confidentiality issue. As an illustration, cl. 11 of the works contract between Aquarius and Nubika had provided:

> 11. CONFIDENTIALITY OF THE CONTRACTOR'S ANAEROBIC DIGESTER TECHNOLOGY.
>
> The Client shall abide by the Confidentiality and No-disclosure requirements of the Contractor's Anaerobic Digester Technology know-how and design as follows: (i) The Client or any other persons under his employment shall not disclose any technological and technical information on the know-how and design of the Contractor's Anaerobic Digester Technology to any other persons or organisations outside the Client's company. (ii) The Client shall not use the know-how and design for its own purposes by

A installing additional anaerobic digester plants on its own for its other palm oil mills, or in any competitive manner against the Contractor. (iii) The Confidentiality and No-disclosure requirements shall be binding to the Client, and any persons under his authorisation and assignment to the project. (See p. 77, Respondent's Core Bundle of Documents).

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[45] The defendants had contended that even if there was a fiduciary relationship between the two parties, the defendants had not breached the fiduciary duty. But the evidence adduced had persuaded the learned trial judge to differ from that stance taken C by the defendants. To her, the defendants had breached that duty. For that stance, she had given her reasons.

[46] Among others, the reasons were clearly spelt out in her grounds of judgment. To our mind, two pieces of evidence as D found by the learned trial judge had nailed it on the head. Those evidence had been concerned with the drawings that purportedly related to the USB system. In this regard, we cannot do better than to reproduce the learned judge's findings, which can be found in her grounds of decision, at pp. 45-47 in her grounds of E decision:

106. The Plaintiff however contended that DW1 subsequently made changes to certain features of the system that the 1st Defendant was building for QLP (see Exhibit P-3 the slide presentation by NS Chua). In respect of the changes made by F DW3 (reference is made to Exhibit P-3), PW1 performed a visual comparison of the engineering drawings of the CSTR System by Keck Seng and the engineering drawings of the "USB system" allegedly developed by the 1st Defendant for QLP (see Exhibit P-3) pg 22 to 25). In this regard, PW1 testified that:

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(i) As shown at page 24 of Exhibit P-3, the Defendants changed from a "floating roof" tank design to a "membrane roof" tank design. However, in doing so, the Defendants forgot, omitted or mistakenly failed to incorporate the changes across all of its engineering drawings.

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(ii) For example, as shown at that same page, the engineering drawing at page 952 of B22 still maintained a triangle (denoting a "floating roof" design) on top of the tank instead of a semi-circle (denoting the new "membrane roof" design).

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(iii) At page 25 of Exhibit P-3, PW1 further explained that if a "membrane roof" was now employed, there would be no need for external supporting columns coming from the roof

to the ground resting outside of the tank itself. Nevertheless, the engineering drawings at page 952 of B22 still showed these external columns.

107. With regard the mixing system of the POME in the digester tanks (which is one of the unique features of the CSTR System), DW1 admitted under cross-examination that essentially the mixing process in the QLP Project consisted of "circular motion and tangential at the same time". Thus, the irresistible conclusion that can be drawn is that this was the "dual mixing system" that PW1, the creator of the CSTR System, had described as one of the key unique features.

[47] As such, with respect, we see no reasons nor occasion, to differ from her conclusions. We agree with her that the defendants had committed breaches of the fiduciary duty on confidentiality.

[48] As regards the *Anton Piller* order, we are in agreement that the learned trial judge was correct, under the circumstances, to grant the order as applied for by the plaintiff and to not have it set aside. The risk factor that the defendants may destroy or cause to be destroyed the incriminating evidence was not one that was merely playing in the mind of the plaintiff. The various documents that were obtained as a result of the enforcement of that order had brought significant advantages that had helped decipher the problems pertaining to the issues at hand between the parties. Of immense importance, in our view must be the drawings recovered from the defendants from which the ensuing cross-examination of the relevant defendants' witnesses had led to the revelation as regards the true source of the so-called USB system which the defendants had claimed to be entirely different from the CSTR system which had its genesis in the works of SP1 for his employer Keck Seng and for whose use the plaintiff had been paying licensing fees to Keck Seng.

[49] As can been seen above, the learned trial judge had made various findings of facts impacting on the crucial issues. We find that her findings had been supported by the evidence as led before her and her findings had not been without basis. She had the audio-visual advantage of observing the various witnesses who had appeared and testified before her and she had preferred the evidence given by the witnesses for the plaintiff. Her findings had been made not without cogent reasons. In such circumstance, we

A have to defer to her decision. We are of the considered view that the learned trial judge cannot be said to be plainly wrong in coming to her decision, such that we would be justified in invoking our appellate powers so as to right an obvious miscarriage of justice. In our view, there has been none here that needed our
B curial intervention.

[50] We therefore see no merits in the memorandum of appeal as filed by the defendants in this appeal and as such we hereby dismiss the appeal with costs of RM75,000 to the plaintiff/
C respondent. We also order that the deposit be refunded to the defendants/appellants.

[51] Order accordingly.

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